U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAR 18 2013 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a special education teacher for [redacted] She has taught at [redacted] since 2008. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although

> clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 17, 2012. In an accompanying statement, counsel stated:

> [The petitioner's] accomplished dedication . . . has not only theoretically helped improve the education in the country but most importantly has in the process completely and realistically re-created the young lives of students worth living as evidenced by the testimonials from the grateful former students themselves. And as we know, these heartfelt testimonials are as powerful as any award or citation from recognizing bodies.
>
> In addition, the merit of [the petitioner's] request for National Interest Waiver is based on the **improvement to the United States Education more particularly in the field of Special Education, which she has actually already been fulfilling as Special Education Teacher in the State of Maryland since** Notwithstanding this, [the petitioner] is determined to continue her selfless service to the nation of improving the Special Education in the United States of America by challenging

> other public schools in the country to equal at least or better yet surpass the progress obtained by her students in Maryland.
>
> What makes [the petitioner's] request for National Interest Waiver even more meritorious aside from her life changing commitment is the **totality of circumstance** underlying her profession including the fact that **she is one of the very few educators who was acclaimed as** **in Washington, DC.**

(Counsel's emphasis.) The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, it is necessary to examine the evidence submitted in support of the petition. In terms of the petitioner "challenging other public schools in the country" to match or exceed her students' progress, the petitioner must show, first, that her students have in fact made a conspicuously significant level of progress in comparison with other special education students, and second, that teachers and schools across the nation are aware of the "challenge" that counsel claimed the petitioner has posed. In this regard, letters from former students, whatever their emotional appeal, do not show the broader impact and influence that the *NYSDOT* guidelines demand.

Regarding counsel's assertion that the petitioner "is one of the very few educators who was acclaimed as " the record contains a copy of a November 16, 2011 letter on

> You have been chosen from an impressive list of highly qualified teachers to be commended for your achievements in teaching and mentoring. . . .
>
> By nominating your high-achieving middle school students, you will set in motion their personal invitations to attend the . We have allocated space for you to nominate up to 10 of your top students.

There is no indication that being "acclaimed as ' involved more than that phrase appearing in letter. The record contains no background documentation to show how many teachers received such letters. Without such evidence, the assertion that "very few educators" received the letter is unsupported and unwarranted. The letter is, on its face, an effort to solicit nominations and applications for participants in the conference. As such, the letter appears to be promotional literature for the organization. Nothing in the record gives the letter greater significance.

An undated letter from certification specialist at "serves as official notification of [the petitioner's] Highly Qualified (HQ) status for [her] special education assignment at for the 2010-2011 school year." The letter makes it clear that the term "Highly Qualified" is a specific designation with defined requirements, but the record does not

identify those requirements except for "submission of the document." With respect to the significance of the designation, the petitioner has not established that the HQ designation is a rare or unusual honor. Rather, implied the opposite, by stating: "As you are the teacher of record, you are required to be HQ in the content area(s) you are teaching your special education students." The quoted passage indicates that HQ designation is a basic qualification for the job, rather than a mark of distinction.

The petitioner submitted copies of various materials relating to her work, including certificates, evaluations and photographs. Similarly, several witness letters show that colleagues and administrators hold the petitioner in high regard. These materials demonstrate that the petitioner is a successful and dedicated teacher, but they do not self-evidently set her apart from other competent and qualified teachers.

On June 9, 2012, the director issued a request for evidence. The director noted that the petitioner is the beneficiary of an approved immigrant petition filed by . The director instructed the petitioner to "submit evidence that the beneficiary's contributions will impart national-level benefits," and stated: "The petitioner must establish she has a past record of specific prior achievement with some degree of influence on the field as a whole. The petitioner's previous influence on the field as a whole must justify projections of future benefit to the national interest."

In response, counsel asserted that it is unrealistic to expect a special education teacher's work to produce a benefit that is national in scope. This observation is consistent with *NYSDOT*, which contains the following passage: "While education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Id.* at 217 n.3. Counsel, however, contends that "the proposed employment [is] national in scope" because "Acts of Congress and other pronouncements" have stressed the importance of educators and education. In this way, counsel conflates the national importance of "education" as a concept, or "educators" as a class, with the impact of one teacher. The undeniable importance of education as a whole does not imply that Congress has indirectly exempted teachers such as the petitioner from the job offer requirement.

Counsel contends that the labor certification process "would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind." Section 1114(b)(1)(C) of the No Child Left Behind Act, 20 U.S.C. § 6314(b)(1)(C), dictates that "[a] schoolwide program shall include . . . [i]nstruction by highly qualified teachers." The regulation at 34 C.F.R. § 200.56 defines the term "highly qualified teacher," and the regulation at 34 C.F.R. § 300.18 lists supplementary requirements for "highly qualified special education teachers." Counsel did not discuss those regulations or Maryland's state-specific requirements, or cite any evidence to show that the labor certification process does not permit the hiring of "highly qualified teachers." If, by law, a teacher must be "highly qualified," then a teacher who does not meet the applicable requirements is not "minimally qualified." Rather, that teacher is underqualified or unqualified. Counsel has not shown that the labor certification process has forced or any other Maryland jurisdiction to hire teachers who do not meet the requirements of "highly qualified teachers." Rather, because "highly qualified" is statutory standard for such teachers, that term appears to be functionally equivalent to the term "minimally qualified" for purposes of labor certification.

Counsel stated that "unquantifiable factors that zero in on 'passion'" distinguish the petitioner from qualified United States workers. This unprovable assertion attempts to sidestep, rather than meet, the "national scope" prong of the *NYSDOT* national interest test. Furthermore, because the regulations contemplate a specific definition of "highly qualified teachers," counsel cannot arbitrarily substitute a new definition of the term that includes the petitioner while excluding similarly qualified United States workers based on admittedly "unquantifiable factors." Counsel's assertion that the petitioner is a "**truly prepared, duly qualified, well-recommended and worthy candidate** to continue serving her students" (counsel's emphasis) is, likewise, beside the point. The director did not assert that the petitioner is unqualified to work as a teacher for Rather, the petitioner has sought an additional immigration benefit (the national interest waiver) beyond the basic immigrant classification, and the director found that the petitioner had not submitted sufficient evidence to qualify for that additional benefit. Many of counsel's core assertions rest on the false premise that *NYSDOT* does not, or should not, apply to school teachers.

The petitioner submitted additional certificates and evaluations, as well as further background information about public education. The background materials are general in nature, and therefore do not pertain specifically to the petitioner. The certificates and evaluations, like those submitted previously, acknowledge the petitioner's "service" and "effort," factors that the director had not questioned. The materials did not show that the petitioner, while working for has had a significant impact on education outside or is likely to do so in the future.

The director denied the petition on November 2, 2012, stating that the petitioner had not established a past record of achievement and influence that would justify the special benefit of the national interest waiver. The director quoted from several witness letters and acknowledged counsel's assertions, but found that the petitioner had not addressed basic requirements of the *NYSDOT* national interest test.

On appeal, counsel notes that Congress passed the No Child Left Behind Act three years after the issuance of NYSDOT as a precedent decision, and that therefore "[t]here is no longer vagueness or obscurity" on the question of whether "highly qualified teachers" serve the national interest. Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The assertion that the No Child Left Behind Act is tantamount to a retraction or modification of *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that the No Child Left Behind Act indirectly implies a similar legislative change.

Turning to immigration legislation, counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

(Counsel's emphasis.) Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the section of relevant law that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers, and any attempt to fashion such a waiver out of the wording of the statutes must therefore fail.

Counsel asserted that the director "erred in disregarding evidence demonstrating the national scope of petitioner's proposed benefit through her effective role in serving the national educational interest of closing the achievement gap." Closing that gap is a national goal, but it does not follow that the petitioner's efforts toward that goal are, themselves, national in scope. Counsel did not show that the petitioner's individual work significantly "clos[ed] the achievement gap" at a national level, rather than locally in one district, one school, or one classroom.

Counsel lists five previously submitted exhibits, calling them "awards" and stating that they constitute "overwhelming evidence" that the petitioner "has a past history of achievement with some degree of influence on the field of math education as a whole." Counsel does not explain this contention. The five exhibits comprise the following:

- A "Certificate of Recognition" from the [redacted] acknowledging the petitioner's "Extraordinary Effort Working for Positive Changes in Special Education on behalf of the Special Education [redacted]
- A "Certificate of Appreciation" thanking the petitioner for her "support and participation of our 2009-2010 Assessments at [redacted];
- An "Outstanding Service certificate" from the [redacted] thanking the petitioner "for her invaluable contribution in giving academic help to the students of [redacted]
- The petitioner's "Teacher Evaluations" from 2008 to 2010, showing that the petitioner consistently received the ranking of "Satisfactory." The evaluation forms show only three rankings: "Satisfactory," "Needs to Improve" and "Unsatisfactory"; and

- A "Classroom Observation" form describing a 7th grade language arts class that the petitioner taught on March 25, 2010, with the objective of teaching students "to identify cause and effect." The form concludes with three recommendations:
    1. Please write your objective in behavior form (expected outcome)
    2. Continue to use several strategies to help students understand the lesson.
    3. Continue the use of technology to motivate student learning

Counsel fails to explain how the above activities (all of them local) constitute "overwhelming evidence" of the petitioner's influence on the field as a whole. The petitioner has not shown how her work for which began in 2008, several years before the filing date, has produced benefits that are national in scope or will continue to do so in the future.

Counsel contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers. This assertion is tenuous for a number of reasons, not least of which is counsel's attempt, elsewhere in this proceeding, to compare the petitioner to other qualified workers by declaring her to be so superior that to replace her would be a disservice to her students.

Counsel denounces the labor certification process as "tedious," but the national interest waiver is not merely a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *NYSDOT*, 22 I&N Dec. 223.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.